No. 92-1

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Lynwood Moreau, *et al.*,
Petitioners,

v.

Johnny Klevenhagen, *et al.*,
Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Fair Labor Standards Act as amended provides that public employers may substitute compensatory time at the rate of not less than 1 1/2 hour for each hour of overtime worked in lieu of overtime pay in cash, provided that the compensatory time is pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. Section 207(o)(2)(A).]

Section 207(o) further specifies that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. Section 207(o).]

The question presented here is whether a public agency may reach an agreement regarding compensatory time with individual employees under subclause (ii) when the agency is barred by state law from reaching an agreement with a union representative under subclause (i).

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STATUTES AND REGULATIONS

Petitioners have omitted the Texas state laws which prohibit, as against public policy, collective bargaining agreements between a political subdivision and employee representatives unless the voters of the political subdivision have approved the Texas Fire and Police Employee Relations Act. Tex.Rev.Civ.Stat.Ann., Art. 5154c and 5154c-1 (Vernon 1987). These Texas laws are reproduced as Respondents' Appendix A and B.

STATEMENT OF THE CASE

1. The subject matter of this litigation is whether Respondents' policy of compensatory time off ("comp time"), in lieu of cash payments, to individual deputy sheriff-Petitioners is authorized pursuant to 29 U.S.C. section 207(o). Respondents do not concur with Petitioners' Statement of the Case #1. A correct statement of the law is that the Fair Labor Standards Act (hereinafter "FLSA") as amended provides that public employers may substitute compensatory time at the rate of not less than 1 1/2 hour for each hour of overtime worked in lieu of cash payments of 1 1/2 times the employee's normal pay for overtime worked, provided that the compensatory time is pursuant to (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees, or (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. See FLSA Section 7, 29 U.S.C. Section 207(o)(2)(A)(i) and (ii). (Pet. App. E).

The Secretary of Labor, in responding to expressed concern that an agreement between the public agency and representatives of employees [FLSA section 207(o)(2)(A)(i)] would conflict with some state laws, expressly stated that it is not the intent of the Department of Labor to preempt state law:

> The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices. 52 Fed. Reg. 2014-15 (January 16, 1987), codified at 29 C.F.R. Part 553.23 (Pet. App. E, p. 35a).

In the present case, an agreement with a representative under Section 207(o)(2)(A)(i) would conflict with Texas law. Under Texas law, a political subdivision can not enter into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act. Tex.Rev.Civ.Stat.Ann. art. 5154c and art. 5154c-1. (Resp. App. A). Harris County constituents have not voted to adopt this act; thus, the County has no authority to bargain with the Union.

2. The Harris County Deputy Sheriffs who are named as petitioners along with the Harris County Deputy Sheriffs Union, Local 154 (hereinafter "Union"), are employed by Harris County, Texas in the Harris County Sheriff's Department under the Sheriff of Harris County, Johnny Klevenhagen (hereinafter, collectively "County"). Under the Harris County pay system, deputy sheriffs receive compensatory time as overtime compensation. Time worked over 40 hours per week, if not taken off during the week

worked, is accumulated in a "comp time" bank for the individual at 1 1/2 times the overtime hours actually worked. After the deputy reaches 240 hours in his "comp time" bank, he or she is paid in cash. Under FLSA Section 207(o)(2)(B) (Pet. App. E), the County's pay system which was in effect on April 15, 1986, the date the statute became effective, constitutes an agreement between the County and deputies hired prior to that date. For deputies hired after April 15, 1986, the individual compensation form signed by each deputy before the performance of work constitutes individual agreements of the type contemplated by Section 207(o)(2)(A)(ii).

3. Petitioners instituted this suit in the United States District Court for the Southern District of Texas, Houston Division, on April 15, 1988, alleging that they are not properly compensated for their individual overtime, pursuant to Section 207(o). Plaintiffs/Petitioners moved for partial summary judgment, claiming that Defendants/Respondents violated FLSA by: (1) Defendants'/Respondents' use of compensatory time in lieu of cash payment without bargaining with Harris County Deputy Sheriff's Union, Local 154, as the individual petitioners' representative, (2) Defendants'/Respondents' exclusion of "longevity pay" in the calculation of Plaintiffs'/Petitioners' "regular rates" of pay for the purpose of computing overtime rates, and (3) Defendants/Respondents refusal to use Plaintiffs'/Petitioners' firearm training hours as hours worked. Defendants/Respondents also moved for summary judgment. The trial court denied Plaintiffs'/Petitioners' motion for partial summary judgment and granted Defendants'/Respondents' motion for summary judgment on all three issues in its Final Judgment entered September 5, 1990. (Pet. App. C). In his Memorandum and Order of September 5, 1990, (Pet. App. B), Judge DeAnda, Chief Judge of the Southern District of Texas, Houston Division, points out that the principle area of disagreement in the case is whether subclause (i) or

subclause (ii) of FLSA Section 207(o)(2)(A) is applicable, and states that the answer turns on the meaning attached to the phrase "not covered by subclause (i)" found in subclause (ii). He held that subclause (i) does not control in the present case since Local 154 can not be a recognized representative because the voter adoption requirements in Texas law, Tex.Rev.Civ.Stat.Ann., Art. 5154c Section 1, have not been met, and therefore, subclause (ii) controls and the individual agreements between the employees and Harris County places Defendants/Respondents in compliance with FLSA section 207(o). In this opinion Judge DeAnda relies on the decision of the Eleventh Circuit in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied* 111 S.Ct. 210 (1990).

Petitioners then filed a Notice of Appeal from the final judgment to the Fifth Circuit Court of Appeals on September 25, 1990, pursuant to 28 U.S.C. Section 1291. On March 31, 1992, the Fifth Circuit rendered its opinion (Pet. App. A) and affirmed the grant of summary judgment on the first two claims (the compensatory time issue and the longevity pay issue) but reversed and remanded to the district court for further proceedings respecting the third issue, finding that the Plaintiffs/Petitioners were misled by the district court's bifurcation of the case and thereby prevented from presenting adequate summary judgment proof on the issue of hours used by deputies in firearm training. In affirming the district court's judgment regarding the compensatory time issue that is presently before this Court, the Fifth Circuit addressed Appellants'/Petitioners' contention that even in light of the Texas law that prohibits political subdivisions from entering into collective bargaining agreements, the County was still required to enter into an agreement with the Union before it could pay deputies in comp time because under Section 207(o)(2)(A)(i) comp time may be authorized pursuant to agreements that are not classified as collective bargaining agreements, and thus not violative of Texas

law. The Fifth Circuit rejected Appellants'/Petitioners' argument, holding that "Texas law prohibits **any bilateral** agreement [emphasis added by Respondents] between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the County could not enter into **any** agreement with the Union [emphasis supplied by Fifth Circuit]." The Fifth Circuit held that, because Texas law prohibits the County from entering into a collective bargaining agreement with the Union, there is no such agreement, and the deputies are not covered by subclause (i) of Section 207(o)(2)(A), but rather by subclause (ii). The Court went on to hold that the payment of comp time in lieu of cash is proper because the County is in compliance with Section 207(o)(2)(A)(ii) in that the County's pay system which was in effect on April 15, 1986, constitutes an agreement between the County and deputies hired prior to that date, and the individual compensation form signed by each deputy hired after April 15, 1986, constitutes individual agreements between the County and such deputies.

SUMMARY OF THE ARGUMENT

This case should not be reviewed on certiorari (1) because this case raises no conflicting circuit court opinions commanding reconciliation by this Court, (2) because the Fifth Circuit's opinion is fairly narrow in effect and raises no issues of national importance, and (3) because Petitioners have failed to present their petition for certiorari with accuracy as required by Rule 14.5. Further, the Fifth Circuit's decision was accurately and fairly decided and Petitioners should not seek this Court to merely serve as a "super-appellate" court to review legal principles and factual findings which have been decided adversely to them.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.
THE FIFTH CIRCUIT'S MOREAU OPINION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS DECIDING THESE SAME OR SIMILAR MATTERS.

Four United States Courts of Appeals, in addition to the Fifth Circuit, have rendered opinions regarding the issues involved with FLSA Section 207(o). The Fourth, Eleventh, and Ninth Circuit opinions are directly on point as to the question presented in the present case and are in agreement with the holding in the present case. The Tenth Circuit opinion is not on point as it does not raise the issue of state law preclusion of an agreement between a public agency and an employee representative, but instead renders a decision on a separate issue.

A. The Tenth Circuit: *West Adams*

The first court of appeals to interpret FLSA Section 207(o) was the Tenth Circuit in *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). Petitioner misstates the facts and mischaracterizes this case. Petitioner contends

> [t]he Fire District averred that it was precluded from entering into such an agreement since Colorado - like Texas here -... precluded it [Fire District] from entering into an agreement with the representative under Section 207(o)(2)(A)(i), and that it was therefore free under Section 207(o)(2)(A)(ii) to follow its past practices regarding compensatory time regardless of its employees efforts to designate a representative. The Tenth Circuit rejected this argument concluding that under the FLSA, once employees

> designate a representative for purposes of reaching a Section 207(o)(2)(A)(i) agreement, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement with that representative. (Petition, page 7, 8).

With these misstatements, Petitioners would lead this Court to believe that the Tenth Circuit in *West Adams* addressed the same issue that the Fifth Circuit has addressed in the present case and yet reached a different conclusion. However, this is a blatant mischaracterization. The issue of state law specifically precluding a collective bargaining agreement does not even enter into *West Adams*. The alleged Colorado state law and the Fire District allegedly being precluded by such state law from entering into an agreement with representatives is not mentioned, or even alluded to, in West Adams. Colorado State law is not discussed. The issue is certainly not considered by the circuit court in its rationale. This "argument" is not made, much less "rejected" by the Tenth Circuit.

It is possible that Petitioners' inaccuracy is based on a misunderstanding of the Tenth Amendment issue addressed by the court. The Tenth Circuit held that the FLSA statute itself is not unconstitutional as a violation of the Tenth Amendment in that state and local government were intensely involved in the procedure leading up to the FLSA amendment. However, in addressing this issue and other issues in West Adams, the court never touched upon the question of state law precluding collective bargaining nor on whether this would prevent the employee from having representation under subclause (i).

The Tenth Circuit in *West Adams* analyzed the Department of Labor regulations interpreting Section 207(o) and held that (1) if employees have a representative, an employer may pay comp time

in lieu of cash only pursuant to an agreement between the employer and the representative, and that (2) employees are deemed to have a representative by merely designating a representative, whether or not the employer recognizes the representative. This holding does not purport to decide the issue of whether this applies when the public employer is precluded by state law from negotiating with a representative, and, therefore, is clearly distinguishable from this present case.

Even though *West Adams* is not in conflict with the Fifth Circuit's holding in this present case, Respondent would point out that the rationale used in arriving at the *West Adams* conclusion is flawed. The opinion is written by the Honorable Earl E. O'Connor, Chief Judge of the United States District Court for the District of Kansas, sitting by designation. Judge O'Connor's entire rationale is based upon the assumption that the statutory language of Section 207(o) is ambiguous. He examines the Department of Labor's regulations and the legislative history to determine whether the regulations are reasonable, and, having concluded that the statutory language is ambiguous, states the Department's construction of the section, if reasonable, is controlling even if there is an equally reasonable construction which the court would have reached de novo, citing *Blue Cross Association v. Harris*, 664 F.2d. 806 (10th Cir. 1981). Therefore, the *West Adams* opinion is based upon an analysis and application of the law regarding ambiguous statutory language rather than upon the legal principles and analysis of the statute regarding compensatory time.

Respondent asserts that the statutory language which Judge O'Connor finds to be ambiguous is clear on its face when considered in light of the entire subsection 207(o)(2)(A). Judge O'Connor finds the phrase "employees not covered by subclause (i)," which is found at the beginning of subclause (ii) and indicates

which employees are covered by subclause (ii), is ambiguous in that these words have two possible meanings, either referring (1) only to employees who have not designated a representative, or (2) to employees who have designated a representative but that representative and the employer have failed to come to an agreement. Respondent disagrees. By looking to subclause (i) it is easy to see which "employees are not covered by subclause (i)" and thus are covered by subclause (ii). Read in its context, subclause (i) states that a public employer may provide compensatory time in lieu of overtime pay in cash pursuant to "applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees." The subject of this subclause is "agreement." The ability of a public employer to provide compensatory time in lieu of cash payment depends upon an agreement. An agreement can not be an "agreement" unless it is "between" two parties. This statute specifically states it must be "between" the public agency and representatives of such employees. There must be a meeting of the minds. Therefore, subclause (i) refers to employees on whose behalf an agreement between the public agency and a representative has been ma[illegible], and subclause (ii) applies to all other employees, i.e., all employees on whose behalf an agreement has not been reached by a representative and the public agency. This would include those employees who have not designated a representative. Therefore, the statement "the case of employees not covered by subclause (i)" is not ambiguous but has a plain meaning and should be interpreted as such. Judge O'Connor's interpretation that subclause (i) refers to any employee who has designated a representative whether or not an agreement has been reached with that representative by the public employer, and that subclause (ii) refers only to the employee who has not designated a representative is highly inconsistent with the plain language of the entire statute.

See Dillard v. Harris, 885 F.2d 155549 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 210 (1990).

B. The Fourth Circuit: *Abbott and Wilson*

1. *Abbott*

The Fourth Circuit has rendered two opinions on Section 207(o)--*Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 854 (1990), and *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992). Petitioners assert that the Fourth Circuit's two opinions are in conflict. This is contrary to the court's own assertion and holdings. Petitioners also incorrectly assert that *Abbott* is in conflict with *West Adams*. These two cases are clearly distinguishable on the facts and on the issues.

In *Abbott v. City of Virginia Beach* the Fourth Circuit addresses the question of whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory leave in lieu of money for overtime where state law prohibits the employer from entering into agreements with employee representatives. This is the same question that is presently before this court. The *Abbott* court relies on the Secretary of Labor's comments in the preamble of the Labor Department's regulations which states, "[i]t is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] be determined in accordance with State or local law and practices." 52 Fed.Reg. 2012, 2015 (Jan. 16, 1987), codified at 29 C.F.R. Part 553. *Abbott* holds that when state law prohibits agreements between a representative and the public agency, such agreements can not be made because they would "preempt" state law, and the public agency may enter into individual agreements with the employees.

Petitioners try to distinguish the facts of *Abbott* from the present case by pointing out that Virginia law absolutely prohibits local governments from collective bargaining while Texas law has an exception to its prohibition. Texas will only permit collective bargaining by a political subdivisions when the constituents of that political subdivision have voted to adopt the Texas Fire and Police Employee Relation Act pursuant to Tex.Rev.Civ.Stat.Ann., art. 5154c-1 (Vernon 1987). Otherwise, collective bargaining is void as against public policy pursuant to Tex.Rev.Civ.Stat.Ann., art. 5154c (Vernon 1987). Petitioners' distinction is irrelevant and certainly does not help them. Virginia has an absolute prohibition. Texas also has an absolute prohibition with one exception. Harris County does not fit within that exception and therefore the Texas prohibition is absolute in effect under the facts of this case. The voters of Harris County have not voted to adopt the Texas Fire and Police Employee Relation Act and, thus, Texas state law does prohibit the County from collective bargaining. The issue is the same in Abbott and in the present case - both public employers are prevented from entering into agreements with employee representatives by state law. Because of the state law prohibitions, the public employers are not required to reach an agreement with the employee representatives before giving compensatory time in lieu of cash overtime pay. These public employers may have such a compensatory time policy pursuant to individual agreements with the individual employees.

Petitioners assert that *Abbott* cannot be reconciled with *West Adams*. This misstatement is due to their blatant mischaracterization of the facts and conclusion in *West Adams* by inaccurately asserting that the Fourth Circuit considered the issue of a state law precluding the public agency from collective bargaining. *West Adams* did not address the issue of state law, whereas state law is the central issue in *Abbott*. When a state law prohibits an

agreement between an employee representative and the public agency, the rule in *West Adams* is not reached because the consideration of whether subclause (i) controls by the employee merely designating a representative is not raised. Thus, *West Adams* is clearly distinguishable.

Throughout the Petition, Petitioners expand upon the importance of a particular fact issue in *Abbott* and, indeed, mischaracterize *Abbott* by inserting this fact into the rule of the case. Petitioners refer to this factual distinction as "absolute choice of cash." Under the facts of the case, the employer has a policy of allowing each individual employee who works overtime to have a choice between overtime pay and compensatory time. The court notes that such a policy fulfills the central purpose of Section 207(o) in allowing some flexibility by the employer in dealing with the overtime and providing the employee an element of choice. However, even though the court makes note of this policy, the policy is not determinative of the holding in the case. The policy is not an element in the court's conclusion that the Section 207(o) allows ". . . public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." *Id.* at 135. The court's holding does not say that public employers may enter into individual employee agreements where state law prohibits the agency from entering into agreements with employee representatives if the employer gives the employee an absolute choice of cash. *Abbott* does not make a rule regarding "absolute choice of cash." The "absolute choice of cash" is simply a distinguishing part of the fact pattern of this case. Yet, Petitioners mischaracterize the *Abbott* holding as being reflective of the "absolute choice of cash" factual distinction. For example, Petitioners assert that Georgia's mandate of no overtime cash approved of in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989),

cert. denied, 111 S.Ct. 210 (1990). ". . . would have violated the Abbott 'absolute choice of cash' rule." (Petition, page 12). Furthermore, Petitioners' assertion that "Georgia's unilateral mandate of no overtime cash was approved by *Dillard*" (Petition, page 12), is also a fabrication. Georgia does not have a unilateral mandate of no overtime cash. The court in *Dillard* even stated "[t]here is nothing in this case...[to] prevent an individual employee from negotiating for and obtaining an agreement that cash would be paid for his or her overtime work." *Dillard* at 1556. Petitioners seem to have fabricated the *Abbott* "absolute choice of cash rule" and the Georgia "unilateral mandate of no overtime cash" in attempting to convince this Court that the circuits are widely divided in their holdings regarding Section 207(o). Contrary to Petitioners' contention that there is great conflict among the circuits, there is only one issue of disagreement in interpreting the statute (discussed *infra* under *Dillard*), and there is **no** dissention as to the issue of state law that is presented in this present case.

2. *Wilson*

The Fourth Circuit's next opinion regarding Section 207(o), *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992), is also the most recent circuit court opinion on this subject. Again, Petitioners make misstatements of fact by saying that *Wilson* conflicts with the Fourth Circuit's own precedent in *Abbott*. It does not.

Wilson holds that a union representative is not a true "representative" pursuant to subclause (i) of Section 207(O)(2)(A) when the state law prohibits public employers from collective bargaining, and, therefore, the public employer is not required to reach an understanding with the union in order to grant compensatory time in lieu of overtime pay. The court holds that "[b]ecause Local 660 was not a representative whom the City could

recognize consistently with state law . . . the Fire Fighters did not have a representative within the meaning of the regulation . . . ," *id.* at 1396, and therefore, there could be no agreement under subclause (i). The court concluded that since subclause (i) can not apply, subclause (ii) applies. The court found there is an agreement under subclause (ii) because the employees were hired before April 15, 1986, and thus the regular practice in effect on that date constitutes an agreement between the employer and the employees pursuant to Section 207(o)(2). The court therefore held that the employer is in compliance with FLSA Section 207(o) in giving compensatory time off in lieu of cash payments. This holding is completely consistent with *Abbott*, contrary to the assertions of Petitioners. This opinion merely gives a detailed analysis behind the underlying rule of both *Abbott* and *Wilson* which states that when state law prohibits an agreement with a representative under subclause (i), then subclause (ii) applies. Wilson was decided just six weeks after the Fifth Circuit decision in this present case, and these two holdings are also entirely consistent.

Petitioners' contention that *Abbott* and *Wilson* are in conflict is probably due to their misunderstanding of the *Abbott* holding. Petitioners incorrectly state at several places in the Petition that *Abbott* agreed with *West Adams* in accepting the purported interpretation of Section 207(o) that where employees have designated a representative, the employer must reach an agreement with that representative or pay money for overtime. (Petition, page 13). In other words, the employer does not have the option of entering into an agreement with the employee if an agreement is not made with the representative. *Abbott* does not agree with this construction. The court in *Abbott* reviewed the legislative history and the conflict between the Senate and the House as to this issue, and acknowledged that the Secretary of Labor followed the House position that once a representative has been designated by an

employee, the employer can only enter into an agreement regarding comp time with that representative, and, if no agreement is reached, the employer must make cash payment for overtime. This position is at odds with the Senate position that the employer may enter into an agreement regarding comp time with the individual employees who are not covered by an actual agreement between the employer and the designated representative. Even though the court in *Abbott* discusses this issue, they do not state their own conclusion as to the issue as it is not necessary to their holding. In *Wilson*, however, the Fourth Circuit does take a position on this issue by holding that if a public agency does not enter into an agreement with a representative designated by its employees, it may enter into such an agreement with its individual employees pursuant to subclause (ii), thereby agreeing with the Senate understanding. *Id.* at 1, citing *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S.Ct. 210 (1990). This issue of whether subclause (i) controls by an agreement with the representative as opposed to the mere designation of a representative by the employee is the one issue that is in disagreement among the circuits. This issue, as discussed *infra*, is not raised by the question before the Court in the present case.

C. The Eleventh Circuit: *Dillard*

The Eleventh Circuit addresses the FLSA Section 207(o) issue in *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, ___U.S. ___, 111 S.Ct. 210 (1990). The holding in this case is completely consistent with *Abbott* and *Wilson*, as well as with the present case. In fact, the Fifth Circuit relied on *Dillard* along with the Fourth Circuit opinion in *Abbott*. All three cases have the same fact situation: (1) the employees had designated a representative, (2) state law prohibited the public employer from entering into a collective bargaining agreement, and (3) the public employer, without an agreement with the employees' representative, had

established a pay system providing for comp time. In *Dillard*, the court declared that it agrees with, and is following *Abbott*, holding that if state law prohibits collective bargaining, the public employer is precluded from entering into an agreement with the employee's representative, and can enter into an agreement with the individual employees. However, while stating that it is following *Abbott*, the court discusses an alternative approach that reaches the same result. Under this alternative approach, Chief Judge Roney examines the legislative history, the regulations, and the rules of statutory construction and concludes that under the plain language of Section 207(o), the pivotal issue of the applicability of subclause (i) is whether there is an "agreement." If there is not an actual "agreement" between the public employer and the employee representative, then subclause (ii) can come into play and the employer and employee can have an individual agreement. Judge Roney points out that under this alternative analysis, the state law issue need not be considered because if state law prohibits the public agency from collectively bargaining with employee representatives, there can not be an "agreement" between them, and therefore subclause (ii) would be in effect.

This alternative approach in *Dillard* disagrees with the holding by the Tenth Circuit in *West Adams* that the pivotal issue is whether the employee has "designated" a representative. Under *West Adams* the mere designation of a representative under subclause (i) precludes the public employer from having a comp time policy unless there is an agreement as to this policy by the representative. Under *Dillard*'s well-reasoned alternative approach, even though the employee has designated a representative, if the agency and the representative have not come to an agreement, subclause (i) is not in effect and the agency and the employee can individually agree as to a comp time policy under subclause (ii). Under the *Abbott* analysis adopted by the *Dillard* court, the fact that

state law precludes any agreement between a public agency and a representative has the effect of preventing subclause (i) from being in the picture in the first place, and therefore this issue is not raised.

This alternative approach is merely a secondary way to arrive at the conclusion and is not necessary to the decision reached in *Dillard*, a case concerning which this court has denied a petition for writ of certiorari. Certiorari should not be granted based upon this conflict. Even though this alternative approach does represent a conflict with the Tenth Circuit, this issue is not ripe for decision by this court. The Tenth Circuit's decision in *West Adams* was the first holding on this issue. As other circuits have opportunity to address this issue in the future, more will be written on the subject and it is probable that the conflict will resolve itself.

D. The Ninth Circuit: *Nevada Highway Patrol*

The Ninth Circuit addresses the Section 207(o) issue in *Nevada Highway Patrol Association v. Nevada*, 899 F.2d 1549 (9th Cir. 1990) and agrees with the Fourth and Eleventh Circuits (as well as the Fifth Circuit in this present case) that the analysis of whether subclause (i) of Section 207(o)(2)(A) should apply should begin with reference to state law. *Id.* at 1554. The court held that the public employer may use compensatory time off in lieu of overtime compensation only pursuant to agreement with employees' representative, if employees are represented; however, the determination of whether public employees have a representative should begin with reference to state law. If the state law is contrary, the employee is deemed not represented. "If an agreement is precluded by state law we must then look to [subsection] (ii)." *Id.* at 1554. This holding is clearly dispositive of the question presented in this case.

Under the facts of *Nevada Highway Patrol*, the court found that Nevada law did **not** preclude collective bargaining between the state agency and the representatives of state employees. Nevada law does preclude collective bargaining unless the legislature formally recognizes the employee's representatives. The court found that the legislature had formally recognized the Nevada State Employees Association (NSEA) as the representative of its members, and, therefore, collective bargaining is not precluded by the state law. After deciding state law does not preclude collective bargaining under these facts, the court then moves on to the second stage of the analysis and applies the *West Adams* rule. Under this rule, since NSEA is lawfully and clearly the employee's representative under subclause (i), a compensatory time-off policy in lieu of overtime compensation can not be enacted by the state agency absent an agreement with the NSEA.

Because the *Nevada* legislature had formally recognized NSEA, the Ninth Circuit in *Nevada Highway Patrol* then agreed with the Tenth Circuit in *West Adams* that the key factor in subclause (i) is whether the employee has designated a representative, whereas, the Fourth, Eleventh, and Fifth Circuit agree that the key factor is whether the employer and the representative have reached an agreement. However, even though there is disagreement on this particular issue, the Ninth Circuit agrees with the Fourth, Eleventh, and Fifth Circuits in holding that a state law preclusion of a public employer from entering an agreement with a representative usurps this other issue from being raised because the employer is precluded from coming into an agreement under subclause (i). Thus, these courts are all in agreement with the Fifth Circuit as to the issue in the present case.

Petitioners engage in yet another fabrication in the discussion of *Nevada Highway Patrol*. Petitioners assert that "the Ninth Circuit recognized that even when state law precludes collective bargaining, the state may allow representation, informal agreements and understandings which would satisfy Section 207(o)(2)(A)(i)." (Petition, page 14). This statement is not made in *Nevada Highway Patrol* and there is nothing in the opinion that should lead Petitioners to make this statement. Petitioners also state "the court concluded that the labor organization is an informal representative within the meaning of Section 207(o)(2)(A)(i)." (Petition, page 14). This is another fabrication. The words "informal agreement" or "informal representative" are not even used by the court in *Nevada Highway Patrol*. Indeed, the Nevada state law precludes collective bargaining unless the legislature "formally" recognizes the employees representatives. In reading footnote #5 along with the above two statements, it becomes apparent that Petitioner mischaracterized the court's conclusion in order to try to make the Fifth Circuit's decision come out differently if applied under this misstated Ninth Circuit opinion. Petitioners are inferring that Local 154 is a recognized informal representative and therefore, under this false Ninth Circuit rule, the County could only give comp time by coming to an agreement with Local 154 and would not be able to have individual agreements with employees regarding the comp time. In attempting to present this argument, Petitioners also mischaracterize Texas law. Even an "informal" agreement by the County with a representative regarding overtime pay would violate Texas law. Petitioners state that Local 154 is recognized generally as the representative of its members with regard to their work place concerns by the Harris County Sheriff under Texas law, citing Tex.Rev.Civ.Stat.Ann., art. 5154c, Section 6. It is true that under this statute, representatives are allowed to present employee "grievances," a unilateral concern, to state agencies. However, under art. 5154c Section 1, state

agencies are not allowed to engage in any contracts (bilateral agreements) with representatives respecting the wages, hours, or conditions of employment of public employees. This is a violation of Texas public policy unless five per cent of the voters have signed a petition to get the issue on a November ballot and subsequently a majority of the voters have specifically voted to adopt the Fire and Police Employee Relation Act of art. 5154c-1. Texas case law, *Beverly v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App.--El Paso 1956, no writ) and the Fifth Circuit in this present case hold that agreements such as the one contemplated by Section 207(o)(2)(A)(i) is such a bilateral agreement. Any agreement by County with Local 154, whether characterized as informal or collective bargaining, is prohibited by Texas law.

In applying the facts of this present case to the Ninth Circuit rule, the end result is exactly the same. The first step under *Nevada Highway Patrol* is to apply state law. Texas law precludes the County from bargaining with Local 154 since the voting requirements of Tex.Rev.Civ.Stat.Ann., art. 5154c-1 have not been adopted. Therefore, under the Ninth Circuit rule, subclause (ii) covers the situation since the agreement under subclause (i) is precluded. The County has individual agreements as to comp time with its petitioners/employees who were hired prior to April 15, 1986, because of its prior practices, and the County has individual agreements with its petitioners hired after April 15, 1986, by reason of the individual compensation form signed by each deputy. The County is in compliance with FLSA Section 207(o)(2) under the Ninth Circuit rule.

E. Conclusion

The Fifth Circuit in the present case held that because Texas law prohibits the County from entering into a collective bargaining agreement with the Union, there is no such agreement, and the deputies/petitioners are not covered by the stipulation regarding representatives in subclause (i), but rather are covered by the individual agreement stipulation in subclause (ii). Certiorari should be denied because this opinion does not conflict with the decisions of the other United States Courts of Appeal who have decided the issue of the applicability of subclauses (i) and (ii) of FLSA Section 207(o)(2)(A) where state law precludes public employers from entering into agreements with employee representatives. The Fourth Circuit in *Abbott* held that when state law prohibits agreements between a representative and the public agency, such agreements can not be made because they would "preempt" state law. and the public agency may enter into individual agreements with the employees. The Fourth Circuit further held in *Wilson* that a union representative is not a true "representative" pursuant to subclause (i) when the state law prohibits public employers from collective bargaining, and, therefore, the public employer is not required to reach an understanding with the union in order to grant compensatory time in lieu of overtime pay. The Eleventh Circuit in *Dillard* held that if state law prohibits collective bargaining, the public employer is precluded from entering into an agreement with the employee's representative, and can enter into an agreement with the individual employees. The Ninth Circuit in *Nevada Highway Patrol* held that the determination of whether public employees are represented pursuant to subclause (i) should begin with a reference to state law and if the state law is contrary, the employee is deemed not represented. Clearly, the Fourth, Eleventh, and Ninth Circuit's holdings are supportive of the Fifth Circuit holding. The only other United States Circuit to render a decision as to the interpretation of FLSA Section 207(o), the Tenth Circuit in *West Adams*, does not

address the state law preclusion issue. Petitioners' argument that certiorari should be granted because severe conflict exists among the Courts of Appeal is without merit. The circuits are not in conflict on the issue before the Court, and certiorari should not be granted.

II.
THE FIFTH CIRCUIT'S MOREAU OPINION IS ACCURATELY DECIDED AND IS FAIR TO ALL PARTIES

The Fifth Circuit's opinion in the present case is accurately decided and is also fair to the parties. The accuracy of the opinion is evidenced by the fact of the court's full consideration of the Texas state law, the substantial evidence as to the facts of the case, and the fact that the court's opinion is fully in accord with the opinions of the other circuits regarding the issue. Any other decision would have been inaccurate and unsupported by any other circuit. The fairness of the decision to the deputies/petitioners is evidenced by the fact that the comp time policy is only effective by way of an agreement made with the deputies themselves. The fairness of the decision to the County is evidenced by the fact that the County is given some flexibility in handling the overtime compensation situation.

III.
THE ONE AREA OF DISSENTION AMONG THE UNITED STATES COURTS OF APPEAL REGARDING FLSA SECTION 207(O) IS NOT RAISED BY THE PRESENT CASE AND IS NOT RIPE FOR DECISION BY THIS COURT

The one area of conflict among the United States Courts of Appeal regarding FLSA Section 207(o) is in regard to when an employee is covered by subclause (ii) as opposed to subclause (i). The Tenth Circuit and Ninth Circuit hold that the employee is covered by subclause (i) upon the mere designation of a representative and subclause (ii) only covers employees who have not designated a representative. The Fourth and Eleventh Circuits hold that the employee is covered by subclause (i) upon an agreement between the employer and the employee representative and any employee not subject to such an agreement is covered by subclause (ii). This issue is not raised in the present case. When state law precludes an agreement between a public agency and an employee representative, subclause (i) does not cover the employee. It is immaterial whether or not the employee designates a representative or whether or not the public agency and the representative reach an agreement. Therefore, certiorari should not be granted in the present case based upon this particular conflict among the circuits, which is not in issue in this case.

Furthermore, the issue in conflict is not ripe for decision by this Court. This legal issue is in a state of flux and would benefit from further consideration by lower courts. As other cases and fact patterns are presented in the future and more is written by way of analysis by these and other circuits, it is probable that this issue will resolve itself.

IV.
DECISION TURNS ON ITS FACTS AND WILL NOT HAVE A GREAT NATIONAL EFFECT

The Fifth Circuit's opinion in the present case turns on its own facts, namely the Texas state law that precludes collective bargaining by the County. This opinion is fairly narrow in its effect and is of minor importance in the overall structure of the law. This holding affects the interpretation of FLSA Section 207(o) only as it applies to parties in states with state laws that preclude collective bargaining. Certiorari should not be granted in that the Fifth Circuit's opinion is narrow in it's effect upon the interpretation of Section 207(o) and does not raise an issue that has wide national application.

V.
PETITIONER'S FAILURE TO ACCURATELY PRESENT HIS ARGUMENTS IN THE PETITION

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the Petition." (S.Ct. Rule 14.5). Petitioners have continually misstated and mischaracterized fact and law in the Petition. Respondents have been constrained to spend much time in repeatedly responding to Petitioners' misstatements. Following is a brief recap of the most blatant misstatements and mischaracterizations: (1) In their discussion of *West Adams*, Petitioners incorrectly and blatantly assert that the Tenth Circuit considered and rejected the argument that state law precludes

collective bargaining. (Petition, page 7, 8). (2) Petitioners mischaracterized the *Abbott* holding as having an "absolute choice of cash rule." (Petition, page 12). (3) In their discussion of *Dillard*, Petitioners fabricated a "Georgia unilateral mandate of no overtime cash approved by *Dillard*." (Petition, page 12). (4) Petitioners wrongly assert that the Ninth Circuit in *Nevada Highway Patrol* recognizes that even when state law precludes collective bargaining, the state may allow representation, informal agreements and understandings which would satisfy Section 207(o), again fabricating something that is not even mentioned in the opinion. (Petition, page 14). (5) Also, in their *Nevada Highway Patrol* discussion, Petitioners state that the court concluded that the labor organization is an informal representative within the meaning of Section 207(o)(2)(A)(i), when the court makes no such conclusion. (Petition, page 14). These and the other examples of misstatements and mischaracterizations made by Petitioners compel summary denial of Petitioners' Petition.

CONCLUSION

Petitioners have failed to establish any reason for this Court to grant certiorari in this case. Respondents therefore ask this Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix A

APPENDIX A – TEX. REV. CIV. STAT. ANN., ART. 5154c

Art. 5154c. Public employees collective bargaining contracts with organizations representing; strikes; loss of civil service and other rights

Sec. 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.

Sec. 2. It is declared to be against the public policy of the State of Texas for any such official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees.

Sec. 3. It is declared to be against the public policy of the State of Texas for public employees to engage in strikes or organized work stoppages against the State of Texas or any political subdivision thereof. Any such employee who participates in such a strike shall forfeit all civil service rights, re-employment rights and any other rights, benefits, or privileges which he enjoys as a result of his employment or prior employment, providing, however, that the right of an individual to cease work shall not be abridged so

long as the individual is not acting in concert with others in an organized work stoppage.

Sec. 4. It is declared to be the public policy of the State of Texas that no person shall be denied public employment by reason of membership or nonmembership in a labor organization.

Sec. 5. The term "labor organization" means any organization of any kind, or any agency or employee, representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with one or more employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Sec. 6. The provisions of this Act shall not impair the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right to strike.

Sec. 7. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved.

APPENDIX B – TEXAS FIRE AND POLICE EMPLOYEE RELATIONS ACT, TEX. REV. CIV. STAT. ANN., ART. 5154c-1

Art. 5154c-1. The Fire and Police Employee Relations Act

Designation of act

Sec. 1. This Act shall be known as "The Fire and Police Employee Relations Act."

Policy

Sec. 2. (a) It is declared to be the policy of the State of Texas that cities, towns, and other political subdivisions within the state having police and/or fire departments shall provide the firefighters and policemen, in said departments, with compensation and other conditions of employment that are substantially the same as compensation and conditions prevailing in comparable private sector employment.

(b)(1) It is also the policy of the State of Texas that firefighters and policemen, like employees in the private sector, should have the right to organize for purposes of collective bargaining, for collective bargaining is deemed to be a fair and practical method for determining wages and other conditions of employment for the employees who comprise the paid fire and police departments of the cities, towns, and other political subdivisions within this state. A denial to such employees of the

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right to organize and bargain collectively would lead to strife and unrest, with consequent injury to the health, safety, and welfare of the public. The protection of the health, safety, and welfare of the public, however, demands that strikes, lockouts, work stoppages and slowdowns of firefighters and policemen be prohibited; therefore, it is the obligation of the state to make available reasonable alternatives to strikes by employees in these protective services.

(2) In view of the essential and emergency nature of the public service performed by firefighters and policemen, a reasonable alternative to such strikes is a system of arbitration conducted under adequate legislative standards. Another reasonable alternative, which should be provided in the event the parties fail to agree to arbitrate, is judicial enforcement of the requirements of this Act regarding the compensation and working conditions applicable to firefighters and policemen.

(3) With the right to strike prohibited, it is requisite to the high morale of firefighters and policemen, and to the efficient operation of the departments which they serve, that alternative, procedures be expeditious, effective, and binding. To that end, the provisions of this Act should be liberally construed.

Definitions

Sec. 3. As used in this Act, the following terms have the following meanings:

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(1) The term "firefighter" means each permanent paid employee in the fire department of any city, town, or other political subdivision within the state, with the sole exception of the chief of the department. Nothing herein shall apply to volunteer firefighters.

(2) The term "policeman" means each sworn certified full-time paid employee, whether male or female, who regularly serves in a professional law enforcement capacity in the police department of any city, town, or other political subdivision within the state, with the sole exception of the chief of the department.

(3) The term "public employer" means the proper official or officials within any city, town, or political subdivision whose duty is to establish the wages, salaries, rates of pay, hours, working conditions, and other terms and conditions of employment of firefighters and/or policemen whether such person or persons be the mayor, city manager, town manager, town administrator, city council, director of personnel, personnel board, commissioners, or other officials, by whatever name designated, or by a combination of such persons.

(4) The term "association" means any organization of any kind, or any agency or employee representation committee or plan, in which firefighters and/or policemen participate and which exists for the purpose, in whole or in part, of dealing with one or more employers, whether public or private, concerning grievances,

labor disputes, wages, rates of pay, hours of employment, or conditions of work affecting firefighters and/or policemen.

(5) "Strike" means the failure, in concerted action with others, to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, or in any manner interfering with the operation of any municipality, for the purpose of inducing, influencing, or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment.

Requirement for prevailing wages and conditions

Sec. 4. Cities, towns, and other political subdivisions within the state employing firefighters and/or policemen shall provide those protective service employees with compensation and other conditions of employment that are substantially the same as compensation and other conditions of employment which prevail in comparable private sector employment; therefore, compensation and other conditions of employment for those employees shall be based on prevailing private sector wages and working conditions in the labor market area in other jobs, or portions of other jobs, which require the same or similar skills, ability, and training, and which may be performed under the same or similar conditions.

Right to organize and bargain collectively

Sec. 5. (a) Upon the adoption of the provisions of this Act by any city, town, or political subdivision in this state to which this Act applies, as herein in this section provided, firefighters and/or policemen shall have the right to organize and bargain collectively with their public employer as to wages, hours, working conditions, and all other terms and conditions of employment.

(b) The provisions of this Act may be adopted by any city, town, or other political subdivision to which this Act applies by the following method:

Upon receiving a petition signed by the lesser of five percent or 20,000 of the qualified voters voting in the last preceding general election in such city, town, or political subdivision, the governing body of such city, town or political subdivision shall hold an election within 60 days after said petition has been filed with such governing body. If at said election, a majority of the votes cast shall favor the adoption of this Act, then such governing body shall place this Act into effect within 30 days after the beginning of the first fiscal year of said city or town after said election. The question which shall be submitted to the vote of the qualified electors shall be as follows:

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FOR or AGAINST the following:
Adoption of the state law applicable to "firefighters and policemen" or "firefighters" or "policemen", (whichever shall be applicable), which establishes collective bargaining when a majority of the affected employees favor representation by an employees' association and which preserves the prohibition of strikes and lockouts and provides penalties therefor.

(c) In any city, town, or political subdivision in which the provisions of this Act have been in effect for a period of one year, if a petition signed by the lesser of five percent or 20,000 of the qualified voters voting in the last preceding general election in such city, town, or political subdivision shall be presented to the governing body thereof to call an election for the repeal of the adoption of the provisions of this Act, then and in that event, the governing body shall call an election of the qualified voters to determine if they desire to repeal such adoption. If at said election, a majority of the votes cast shall favor the repeal of the adoption of this Act, then the provisions hereof shall become null and void as to such city, town, or political subdivision. The question which shall be submitted to the vote of the qualified electors shall read as follows:

FOR or AGAINST the following:
Repeal of the adoption of the state law applicable to "firefighters and policemen" or "firefighters" or "policemen", (whichever shall be applicable), which establishes collective bargaining when a majority of the affected employees favor representation by an

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employees' association and which preserves the prohibition of strikes and lockouts and provides penalties therefor.

(d) When any election has been held in any city, town, or political subdivision at which election the adoption or rejection of the adoption of this Act has been submitted as aforesaid, a like petition for another such election shall not be filed for at least one year subsequent to the election so held.

Recognition of bargaining agent

Sec. 6. (a) An association selected by a majority of the paid firefighters of a fire department in any city, town, or other political subdivision, excluding the chief of the department, shall be recognized by the public employer as the sole and exclusive bargaining agent for all of the fighters of that department unless and until recognition of such association is withdrawn by a majority of those firefighters.

(b) An association selected by a majority of the sworn certified fulltime paid policemen of a police department in any city, town, or other political subdivision, excluding the chief of the department, shall be recognized by the public employer as the sole and exclusive bargaining agent for all of the policemen of that department, unless and until recognition of such association is withdrawn by a majority of those policemen.

(c) In the event of a question as to whether or not an association is the majority representative of the employees in a department, pursuant to this section, such question concerning representation shall be resolved by a fair election conducted according to procedures agreeable to the parties. If the parties are unable to agree on such procedures, either party may request the American Arbitration Association to conduct the election and to

certify the results thereof. Certification of the results of an election held pursuant to this section shall resolve the question concerning representation. The public employer shall be responsible for the expenses of the election, provided however that if two or more associations seek recognition as the bargaining agent then said associations shall share the costs of such election equally.

(d) Although the fire and police departments within the same city, town, or other political subdivision shall constitute separate collective bargaining units under this Act, nothing contained herein shall prevent associations representing employees in both of these departments within the same city, town, or other political subdivision from voluntarily joining together for purposes of collective bargaining with the public employer.

Sec. 7. (a) Whenever the firefighters and/or the policemen of a city, town, or other political subdivision of the state are represented by an association in accordance with Section 6 of this Act, the public employer and the association shall be obligated to bargain collectively.

(b) For purposes of this section, to bargain collectively is the performance of the mutual obligation of the public employer and the association to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

(c) The association or the public employer may designate any person or persons to negotiate or bargain on its behalf; and the parties may utilize mediation, pursuant to Section 9 of this Act, to assist them in arriving at an agreement.

(d) Whenever wages, rates of pay, or any other matter requiring appropriation of money by any governing body are included as a matter for collective bargaining pursuant to this Act, it shall be the obligation of the association to serve written notice of request for such collective bargaining on the public employer at least 120 days before the conclusion of the current fiscal operating budget.

(e) All deliberations pertaining to collective bargaining between an association and a public employer or any deliberation by a quorum of members of an association authorized to bargain collectively or by a member of a public employer authorized to bargain collectively shall be open to the public and in compliance with the Acts of the State of Texas.

Enforceability of agreements

Sec. 8. Whenever a public employer and an association reach an agreement on compensation and/or other terms and conditions of employment for firefighters or policemen, pursuant to the provisions of this Act, the public employer shall be deemed to be in compliance with the requirements of Section 4 hereof as to such terms and conditions of employment for the duration of agreement. The agreement shall be enforceable and shall be binding upon the public employer, the association, and the firefighters or policemen covered herein.

Impasse procedures and voluntary mediation

Sec. 9. (a) In any dispute between a public employer and its protective services employees represented by an association, pursuant to this Act, where an impasse is reached in the collective bargaining process, or where the appropriate lawmaking body fails to approve a contract reached through collective bargaining, and as a result the public employer and employees are unable to effect a

settlement, then either party to the dispute, after written notice to the other party containing specifications of the issue or issues in dispute, may request appointment of an arbitration board; provided, however, a party shall not request arbitration more than once during any fiscal year.

(b) For purposes of this section, an impasse in the collectively bargaining process shall be deemed to occur when the parties do not reach a settlement of the issue or issues in dispute by way of written agreement within 60 days after initiation of the collective bargaining proceedings. The period, however, may be extended by written agreement for additional periods of time provided each such extension of time is for a definite period not to exceed 15 days.

(c) Prior to invoking arbitration, the parties shall make every reasonable effort to settle their dispute through good-faith collective bargaining; such efforts shall include mediation, provided a mediator can be appointed by agreement of the parties or by an appropriate agency of the state. If a mediator is appointed, his function shall be to assist all parties to reach a voluntary agreement. He may hold separate or joint conferences as he deems expedient to effect a voluntary, amicable, and expeditious adjustment and settlement of the differences and issues between the parties. He shall make no public recommendation on any negotiation issue in connection with the performance of his service nor shall he make a public statement or report which evaluates the relative merits of the position of the parties. The mediator,

may, however, recommend or suggest to the parties any proposal or procedure which in his judgment might lead to settlement.

Arbitration

Sec. 10. (a) The request for arbitration referred to in Section 9 hereof shall be initiated within five days following the expiration of the 60-day pre-impasse period or within five days following an agreed extension of the period, as provided in Section 9. If both parties elect to settle their dispute by arbitration, such election shall be made within five days following the request for arbitration, and shall be in the form of a written agreement to arbitrate. The issues to be arbitrated shall be all matters which the parties have been unable to resolve through collective bargaining in accordance with the procedures of Sections 7 and 9 of this Act.

(b) Although the policy of this Act favors and encourages the parties to elect voluntary arbitration, nothing contained herein shall be deemed a requirement of compulsory arbitration.

Arbitration board

Sec. 11. If the parties elect arbitration, within five days following the execution of the agreement to arbitrate they shall select and name one arbitrator and shall immediately notify each other in writing of the name and address of the person so selected. The two arbitrators so selected and named shall, within 10 days from the execution of the agreement to arbitrate, attempt to agree upon a third (neutral) arbitrator. If on the expiration of the said 10-day period the two arbitrators have been unable to agree upon the

selection of the third arbitrator, either party may request the American Arbitration Association to utilize its procedures for selection of the neutral arbitrator, and said association shall be authorized to effect the appointment of the neutral arbitrator according to fair and regular procedures. Unless both parties consent, the neutral arbitrator so selected will not be the same person selected as a mediator pursuant to Section 9 hereof. The third (neutral) arbitrator, whether selected as a result of agreement between the two arbitrators previously selected or selected pursuant to American Arbitration Association procedures, shall serve as chairman of the arbitration board.

Hearings

Sec. 12. (a) The arbitration board shall, acting through its chairman, call a hearing to be held within 10 days after the date of the appointment of the chairman; and the board shall, acting through its chairman, give the other two arbitrators, the association, and the public employer at least seven days' notice in writing of the time and place of such hearing. The hearing shall be informal, and the rules of evidence prevailing in judicial proceedings shall not be binding. Any and all documentary evidence and other data deemed relevant by the arbitrators may be received in evidence. The arbitrators shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of books, records, and other evidence relative or pertinent to any issue presented to them for determination.

(b) The hearing conducted by the arbitration board shall be concluded within 20 days of the time of commencement; within 10 days after the conclusion of the hearing the arbitration board shall make written findings, in accordance with Section 12 of this Act, and render a written award on the issues presented. A copy of the findings and award shall be mailed or otherwise delivered to the association and to the public employer.

(c) Time periods specified in this section may be extended for reasonable periods by written agreement of the parties. Time periods may also be extended, for good cause, by the arbitration board, provided the cumulative period of the extensions granted by the board shall not exceed 20 days.

Scope of the arbitrator's authority, effect of the award, and enforceability

Sec. 13. (a) It shall be the duty of the arbitration board to render an award in accordance with the requirements of Section 4 of this Act. Accordingly, hazards of employment, physical qualifications, educational qualifications, mental qualifications, job training, and skills are factors, among others, which the arbitrators shall consider in settling disputes relating to wages, hours, and other terms and conditions of employment.

(b) When an arbitration award is rendered in accordance with these provisions, the public employer involved shall be deemed to be in compliance with the requirements of Section 4 hereof as to the terms and conditions provided by said award for the duration of the collective bargaining period for which the award is applicable.

(c) A majority decision of the arbitration board, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or the arbitration board, in the state district court for the judicial district in which a majority of the affected employees reside.

(d) The commencement of a new fiscal year following the initiation of arbitration procedures under this Act, but prior to the rendition of the arbitration award or its enforcement, shall not render a dispute moot or otherwise impair the jurisdiction or authority of the arbitration board or its award. Increases in rate of compensation awarded by the arbitration board under this section may be effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced since initiation of arbitration procedures under this Act, the foregoing limitation shall be inapplicable and such awarded increases may be retroactive to the commencement of such fiscal year, any other statute or charter provision to the contrary notwithstanding.

(e) The parties may amend or modify an arbitration award by agreement in writing at any time.

Judicial review of the arbitration award

Sec. 14. Awards of the arbitration board shall be reviewable by the state district court for the judicial district in which the municipality is located, but only on the following grounds: (1) that the arbitration panel was without or exceeded its jurisdiction; (2) that the order is unsupported by competent material, and substantial evidence on the whole record; or (3) that the order was procured by fraud, collusion, or other such unlawful means. The pendency of a proceeding for review shall not automatically stay the order of the arbitration board.

Compensation of arbitrators and expenses

Sec. 15. The compensation, if any, of the arbitrator appointed for the firefighters and/or policemen shall be paid by the association representing the firefighters and/or policemen. The compensation of the arbitrator appointed for the public employer shall be paid by the public employer. The compensation of the neutral arbitrator, as well as all stenographic and other expenses incurred by the arbitration board in connection with the arbitration proceedings, shall be paid jointly in even proportions by the association representing the firefighters and/or the policemen and the public employer. If either party in the arbitration requires a transcript of the arbitration requires a transcript of the arbitration proceedings that party shall be required to bear the cost of the transcript.

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Judicial enforcement when the public employer declines to arbitrate

Sec. 16. Should a public employer choose not to elect arbitration when arbitration has been requested by an association pursuant to Sections 9, 10, and 11 hereof, on the application of the association, the state district court of the judicial district in which a majority of the affected employees reside shall have full power, authority, and jurisdiction to enforce the requirements of Section 4 hereof as to any unsettled issue relating to compensation and/or other terms and conditions of employment for firefighters and/or policemen. The court costs of any such action, including costs for a master if one is appointed, shall be taxed against the public employer. In the event the court finds the public employer in violation of Section 4 hereof, it shall: (1) order the public employer to make the affected firefighters and/or policemen whole as to their past losses; (2) declare the compensation and/or other terms and conditions of employment required by Section 4 hereof for the period as to which the parties had been bargaining, but not to exceed a period of one year, and (3) award the employees' association reasonable attorney's fees.

Strikes and lockouts

Sec. 17. (a) Strikes, lockouts, work stoppages, and slowdowns of firefighters and/or policemen shall be unlawful, and they are hereby prohibited.

(b) In the case of a lockout of firefighters or policemen by a municipality, or its designated representative or agent, or a department or agency head, the Court shall (i) issue an order restraining and enjoining such violation, and/or (ii) impose on any individual violator a fine of not more than $2,000.

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(c) Upon the finding by the district court in which the municipality is located that a fire or police service association has called, ordered, aided, or abetted in a strike of firefighters or policemen, the Court shall impose upon such employee organization, for each day of such violation a fine fixed in an amount equal to 1/26 of the total amount of annual membership dues of such association or $20,000, whichever is the lesser; provided, however, that where an amount equal to 1/26 of the total amount of annual membership dues of such employee organization is less than $2,500, such fine shall be fixed in the amount of $2,500. In addition, the Court shall order forfeiture of any membership dues checkoff for a specified period of time not to exceed 12 months. If, however, the association alleges, and the Court finds, that the appropriate municipality or its representatives engaged in such acts of extreme provocation as to or its representatives engaged in such acts or extreme provocation as to detract substantially from the responsibility of the association for the strike, the Court may, in its discretion, reduce the amount of the fine imposed.

(d) If an association appeals a fine imposed pursuant to the preceding paragraph, such employee organization shall not be required to pay such fine until such appeal is finally determined.

(e) If a firefighter or policeman engages in a strike, or interferes with the municipality, or prevents the municipality from engaging in its duty, or commits, attempts or directs any employee of the municipality to stop or decline to work, or slowdown work, or causes any other person to fail or refuse to deliver to the municipality goods or services, or pickets for any of the above illegal acts, or conspires to perform any of the above acts, the wages or compensation in any form of such firefighter or policeman shall not increase in any manner or form, until after the expiration of one year from the date such firefighter or policeman resumes normal working duties, and said firefighter or policeman shall be on probation for two years with respect to civil service

status, tenure of employment or contract of employment, which that person may have theretofore been entitled.

Judicial enforcement generally

Sec. 18. The state district court of the judicial district in which the municipality is located, and any judge thereof, shall have full power, authority, and jurisdiction, on the application of either party aggrieved by an action or omission of the other party, when such action or omission pertains to the rights, duties, or obligations provided in this Act, to issue any and all proper restraining orders, temporary or permanent injunctions, and any other and further writ, order, or process, including but not limited to contempt orders, that are appropriate to carrying out and enforcing the provisions of this Act.

Severability

Sec. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

Act takes precedence

Sec. 20. (a) This Act shall supersede all conflicting provisions in previous statutes concerning this subject matter; to the extent of any conflict the previous conflicting statutory provision is hereby repealed; and this Act shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the state or by any of its political subdivisions or agents, such as, but not limited to, a personnel board, a civil service commission, or a home-rule municipality.

(b) Provisions of collective bargaining contracts made pursuant to this Act shall take precedence over state or local civil service provisions whenever the collective bargaining contract, by agreement of the parties, specifically so provides. Otherwise, the civil service provisions shall prevail. Civil service provisions, however, shall not be repealed or modified by arbitration or judicial action; although arbitrators and courts, where appropriate, may interpret and/or enforce civil service provisions.

(c) Nothing contained in this Act shall be construed as repealing any existing benefit provided by statute or ordinance concerning firefighters' or policemen's salaries, pensions, or retirement plans, hours of work, conditions of work, or other emoluments; this Act shall be cumulative and in addition to the benefits provided by said statutes and ordinances.

(d) Nothing contained in this Act shall be deemed a limitation on the authority of a fire chief or police chief of a city under Chapter 325, Acts of the 50th Legislature, 1947 (Article 1269m, Vernon's Texas Civil Statutes), except to the extent the parties through collective bargaining shall agree to modify such authority.